Filed 4/14/03 Marriage of Hadley and Levine CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| In re the Marriage of CLAIR HADLEY and WILLIAM HOWARD LEVINE. | |
| CLAIR HADLEY,<br>Appellant,<br>v.<br>WILLIAM HOWARD LEVINE,<br>Respondent. | A099784<br><br>(Marin County Super. Ct. No. FL010357) |

This is an interlocutory appeal from a ruling on a bifurcated issue in a marital dissolution proceeding. (Cal. Rules of Court, rules 5.175, 5.180.)[1] The bifurcated issue is the validity of the Premarital Agreement (Agreement) between appellant Clair Hadley (Wife) and respondent William Howard Levine (Husband). The trial court found that the Agreement was valid, and Husband was required to pay Wife certain community property funds as provided by an unambiguous clause of the Agreement, Paragraph 7(b). The trial court rejected Wife's claims that she was entitled to rescind the Agreement under various contract defense theories. On appeal, Wife challenges that portion of the

[1] Further rule references are to the California Rules of Court. Rules 5.175 and 5.180, effective January 1, 2003, deal with bifurcation of issues and interlocutory appeals in family law cases. They are former rules 1269 and 1269.5, respectively.

ruling which denies her the remedy of rescission. We disagree with Wife's contentions and affirm.

## I. FACTS

On October 6, 1994, Wife and Husband executed the Agreement in anticipation of their impending marriage.[2] Independently retained attorneys represented each of them and advised them regarding the provisions and legal consequences of the Agreement. Attorney Rodney Goya advised Wife; attorney Richard Riede advised Husband. Each attorney certified that his client "freely and voluntarily executed the Agreement in my presence."

The purpose clause of the Agreement expressly recognizes that Wife and Husband "enter into this Agreement for the purpose of defining their respective property rights following their contemplated marriage." That clause goes on to state the parties' intent that, with certain express exceptions, all property either party owned at marriage, and acquired during marriage, would remain that party's separate property.

More detailed provisions of the Agreement—Paragraphs 4 and 5—set forth both Wife's and Husband's understanding that, by and large, there would be no community property of the marriage. Each party expressly acknowledged that "except for this Agreement" the other party's earnings and income during the marriage would be community property in which the party would have a one-half interest—but because of the Agreement those earnings and income would remain separate property.

The exceptions to the no-community-property provisions are found in Paragraphs 6 and 7 of the Agreement. Paragraph 6 creates a community interest in certain equity in the parties' residence, and is not at issue on appeal. Paragraph 7(a) involves contributions of separate property by each party to meet common expenses for their agreed-upon standard of living, and likewise is not at issue on appeal.

[2] Husband signed the Agreement October 4, 1994. Wife signed the Agreement October 6, 1994.

Paragraph 7(b) of the Agreement, which concerns us here, provides as follows: [¶] "The parties agree to make every reasonable effort to invest a minimum annual amount of $20,000, if available, in a community property asset or assets each calendar year during the marriage. The annual contribution amount, if any, of investment by each party shall be totally within the discretion of each party. By agreeing to this investment provision, the parties agree that said contribution is not part of their aforementioned [i.e., in Paragraph 7(a)] marital standard of living."

Wife and Husband were married October 9, 1994, just three days after the execution of the Agreement. Their daughter, Zoe Clair Levine, was born February 22, 1996. They separated February 2001, after six years and four months of marriage.

Wife "was a homemaker during [the] marriage" and did not work outside the home, at least after Zoe was born. Husband, on the other hand, made millions of dollars as an executive for Advent Software. He estimates his net worth as $10 million. He "accumulated significant stock options before and during the marriage." His base pay was $195,000, and his income was supplemented by "a variable bonus which has averaged in the high five figures, stock options, and investment income." Wife estimates his net worth as approximately $15 million.[3]

On February 23, 2001 Wife filed a petition for dissolution of marriage. On November 9, 2001, Wife filed a motion to bifurcate the issue of the validity of the Agreement. Wife claimed that Husband never set aside $20,000 per year pursuant to Paragraph 7(b), despite the fact that he allegedly made an average of $1.2 million per year through the couple's six years of marriage. Wife also argued she was entitled to rescission of the Agreement based on failure of consideration, promissory fraud, lack of mutuality, and lack of voluntariness.

In response to the motion to bifurcate, Husband argued that Paragraph 7(b) was discretionary and imposed no obligation on either party, and that breach of any obligation

[3] Husband's Income and Expense Declaration, filed with the trial court on January 14, 2002, listed a base pay of $200,000 and a net monthly disposable income of $40,507.39.

would be remedied by a damage award, not rescission. Husband also argued the Agreement was valid as a matter of law. He disputed Wife's legal theories of lack of consideration, fraud, lack of mutuality, and involuntariness. But Husband "reluctantly stipulate[d]" to bifurcation of the issue of the validity of the Agreement, in the interests of judicial economy.

On January 24, 2002, the trial court heard oral argument on the motion to bifurcate. The court noted the parties had agreed to bifurcate the issue of the validity of the Agreement. But the court told Wife, "I'm not overly impressed with the theory upon which you're alleging the [Agreement] ought to be voided. [¶] . . . [¶] What you have alleged, basically, if true would be a relatively minor breach of a condition [i.e., Paragraph 7(b)] . . . of a rather comprehensive agreement, and you seek to void the entirety on the basis of an alleged breach, which could otherwise be cured by an award of damages or other order of [the] court. [¶] I don't know that that's justification for setting aside an entire agreement which apparently was entered into by both parties with their eyes wide open with the assistance of counsel and which had been negotiated over a very substantial period of time."

The court stated that when it ultimately considered the issue of the validity of the Agreement, "I would quite honestly intend to have you address the legal perspective on this first before we got into any kind of evidentiary hearing. And were we to have an evidentiary hearing, I would want it to become extremely well focused based upon the outcome of the legal debate that would precede that hearing."

On March 20, 2002, Paul Camera, an attorney representing Wife, wrote Husband's attorney Robert Kligman. Camera suggested the parties "cooperate in attempting to short-cut our [im]pending trial and, in the process, perhaps save many thousands of dollars in fees and costs."

In his letter, Camera noted that both parties believed Paragraph 7(b) was unambiguous; the parties simply claimed the provision had two different meanings. "Each party has taken the position that the language of [Paragraph] 7(b), which supports their respective interpretation, is *un*ambiguous—[Husband] contends that 7(b)

unambiguously gives him total discretion whether or not to make any contribution at all to community investment. [Wife] contends that the language of 7(b) unambiguously obligates [Husband] to contribute, annually from his financial resources, a minimum of $20,000, and that the provision for total discretion relates only to whether or not [Husband] wished to contribute more than the annual minimum."

Camera proposed that the parties submit to the trial court, by way of briefs and oral argument, the "strictly legal issue of the proper construction of Paragraph 7(b) . . . ." Camera reasoned that if the court adopted Husband's interpretation, "the next legal issue would be whether [Wife's] defense of lack of mutuality applied so as to invalidate the Premarital Agreement, which [Wife] claims it does *as a matter of law*." (Italics added.) If the court adopted Husband's interpretation and found against Wife on the issue of lack of mutuality, "the only issues left to try would be [Wife's] claims of fraud and lack of voluntariness."

On the other hand, reasoned Camera, if the trial court adopted Wife's interpretation of Paragraph 7(b), "the remaining issue of law would be whether . . . her remedy is rescission . . . or, as [Husband] suggests . . . is limited to money damages. If [Wife] were to prevail on her interpretation . . . and . . . her remedy is rescission, the bifurcated issue would have been finally resolved in the trial court—all without having to call a single witness . . . ."

Camera said his proposed procedure was "as close to a civil motion for summary judgment as there could be in Family Law." But he noted it could only be accomplished by stipulation, the approval of the trial court, and only if the court determined Paragraph 7(b) was unambiguous. He urged Kligman to agree to "this summary judgment procedure."

Kligman rejected Camera's entreaties in a letter dated March 22, 2002. On April 1, Camera wrote the trial court and asked the court to adopt his proposed procedure. Camera cited the court's comments during the January 24 oral argument, the tenor of which was that legal argument on the validity of the Agreement would precede any evidentiary hearing, as a direction from the court "that a hearing similar to a civil

demurrer be held on [Wife's] theory of the case, prior to any evidentiary hearing, so as to avoid an evidentiary hearing, if possible[.]" Camera took the position that the court could order such a procedure over Kligman's objection, because "the Court controls the order of proof."

On April 3, 2002, Kligman wrote the trial court agreeing that he "would like to resolve whatever issues are capable of resolution without taking evidence in summary fashion." He agreed with Camera that the court "has the power to make procedural rulings including summary disposition of issues inasmuch as it controls the order of proof."

Also on April 3, Wife filed a 32-page opening trial brief on the bifurcated issue of the validity of the Agreement. This brief included approximately five pages of facts, which Wife claimed would be shown by the evidence at trial. According to the statement of facts, the draft Agreement originally had a provision that 80 percent of Husband's post-marriage earnings were community property. Wife allegedly abandoned that provision in favor of Paragraph 7(b) because Husband had—falsely, according to Wife—represented he was going to retire early. Wife opted for Paragraph 7(b), with its $20,000 per year contribution scheme, on the theory that "80% of nothing is nothing."

The balance of the opening trial brief contains Wife's legal argument regarding her interpretation of Paragraph 7(b), as well as her "numerous distinct contract defenses to the enforcement" of the Agreement. Wife presented legal argument on the contract defenses of failure of consideration; "promissory fraud," based on a factual allegation that Husband never intended to perform any obligation under Paragraph 7(b); "[l]ack of mutuality of consideration—Illusory Promises"; mistake of law; and lack of voluntariness. Wife again argued she was entitled to elect her remedies, and stated she would elect rescission of the Agreement. Wife also discussed Husband's purported fiduciary duties to her with regard to the Agreement and its provisions.

On April 5, 2002, Camera again wrote the trial court, representing that Kligman's letter of April 3 showed that "counsel for both parties are in favor of the 'summary judgment' approach to the bifurcated issue, to the extent feasible." Camera wrote that his

legal theories had been explained "in somewhat excruciating detail" in his opening trial brief, and concluded: "I maintain that the approach I proposed in my letter of March 20, 2002 to Mr. Kligman, a copy of which has been provided to the Court, is still the way to go."

Husband filed a short trial brief. On April 12, 2002, Wife filed a reply trial brief, in which she "renew[ed] the request made by her attorney Paul Camera, in his letters to this Court on April 1 and April 5, 2002 that this Court expedite these proceedings by holding *a preliminary hearing* at the outset of this trial, or before, *on the strictly legal issue of the proper construction*" of Paragraph 7(b). (Italics added.) Wife referred the court to an attached exhibit, captioned "[Wife's] Proposed Summary-Judgment Approach to the Issues of Interpretation of [Paragraph] 7(b) and Her Election to Rescind and/or Set-Aside the Premarital Agreement."

In this document, Wife proposed a detailed "summary judgment" procedure. First, the court would determine whether Paragraph 7(b) was unambiguous. If the court found any ambiguity "the summary judgment procedure [would be] aborted," in light of the need to introduce extrinsic evidence.

But if the court found the provision unambiguous, and that Wife's interpretation was the only reasonable one, Wife proposed that the only remaining factual questions would be (1) whether Husband had $20,000 per year "available" to contribute to a community property asset, and (2) whether Husband's yearly contribution of $2,000 to Wife's IRA constituted "substantial performance" under Paragraph 7(b).

Wife proposed that if the court adopted her interpretation of Paragraph 7(b), and resolved these two minor factual issues in her favor, Husband's "failure to perform under 7(b) constitutes a material breach of contract and a failure of consideration," entitling her to elect between the remedies of damages and rescission.

Wife further proposed that *if* the court found Paragraph 7(b) unambiguous, but that *Husband's* interpretation was the only reasonable one, "the summary judgment procedure continues . . . ." According to Wife, "the next point of inquiry [would then be] whether [Husband's] promise is, on its face or as a matter of law, an 'illusory promise' (i.e., one

which [Husband] may perform or not, according to his whim) . . . ." If Husband's promise under Paragraph 7(b) was found to be illusory, "then the premarital agreement fails for lack of mutuality . . . i.e., [Husband] never made an enforceable promise, and [Wife's] promise cannot be enforced. . . ."

In sum, Wife proposed:

- if her interpretation of Paragraph 7(b) was correct, Husband was in material breach of the Agreement, and she was entitled to elect damages or rescission;
- if Husband's interpretation of Paragraph 7(b) was correct, Husband may have made an illusory promise, in which case there was a failure of consideration, and she was entitled to the same election.

At about the same time Wife filed the reply trial brief with the attached proposal, Wife apparently filed a motion "For Order Fixing Order of Proof—Legal Issues to Be Presented First." Wife requested that the court order the procedure set forth in her proposal, which was attached to the motion and incorporated therein by reference.

On April 15, 2002, Husband filed a responsive trial brief addressing Wife's legal issues. On April 16, Husband filed his own motion for fixing the order of proof, and calendared the motion for hearing on April 17. Husband asked for a determination that "if the issue is a legal issue only, the court shall determine the issue without evidence being taken," and that "if the issue is amenable to resolution by stipulated facts, offers of proof, or declaration, the court may proceed accordingly."

At the April 17 hearing, the court made some comments on the issues in anticipation of trial. The court did not believe that Paragraph 7(b) was ambiguous, and adopted Wife's interpretation of the provision. Husband's counsel agreed that Husband's ability to contribute $20,000 per year was "not a significant issue." There seems to be no real dispute that only Husband had the financial ability to contribute an annual sum of $20,000.

The trial court also believed the parties' differing interpretations of Paragraph 7(b) did not require that the Agreement be rescinded. In the court's view the Agreement was "fully enforceable," and Wife would be entitled to one-half of the six years' worth of

$20,000 annual contributions Husband was obligated to make under the Agreement. The court described such a damage award as Wife getting the benefit of her bargain. The court also reasoned, "I'm not satisfied that the parties' lack of mutual understanding of the provisions of the contract amounts to lack of mutuality in the formation of a contract."

Wife's counsel reminded the court of Wife's fraud claim. The court responded that since the parties received the benefit of their bargain, "there's no need to examine anything further. No one has been deprived of anything to which they were entitled. There has been no effective fraud." Wife's counsel agreed with the court that the gravamen of Wife's fraud claim was that Wife "was led to believe she was going to get the benefit of the agreement. And . . . [Husband] didn't intend to perform the agreement and give her the benefit of the agreement." The court then told Wife's counsel, "She's going to get the benefit of the agreement. She has not been defrauded of anything which she expected by reason of entering into the agreement. It isn't that she gave up something else. She's going to get what she expected to get."

The court then referred to the depositions of Husband and his attorney Riede, who advised him regarding the Agreement. Wife had mentioned the deposition testimony in her opening trial brief as supporting her claim that Husband had committed promissory fraud because he never intended to perform under Paragraph 7(b), and indeed believed that Paragraph 7(b) put him under no obligation toward Wife. The trial court, which had obviously reviewed the depositions, stated that "nothing in [the] deposition testimony suggests that [Husband] deliberately framed this contract in such a fashion as to mislead someone." The court concluded that Husband and his attorney simply believed Paragraph 7(b) "imposed no obligation on [Husband]. This isn't a fraud."

In the course of the hearing the court reminded the parties that "[Y]ou both invited me to make some kind of a ruling based upon the briefs." Wife's counsel agreed and asked for "a statement of intended decision" on Wife's contract defense theories. The court stated that it was reviewing the allegations of the pleadings and the trial briefs, and accepting the factual allegations of the trial briefs as if they were opening statements.

"And if on the basis of an opening statement in any civil proceeding, the Court cannot find that the relief which is sought is going to be substantiated, the Court is certainly entitled on its own motion or motion of the other party to make a summary ruling . . . ." Wife's counsel agreed and repeatedly indicated Wife wanted a final ruling on the issues without the necessity of a trial. Wife did ask if she could submit additional deposition transcripts before the court's ruling.

In a key passage, Wife's counsel told the court, "I would like to be sure you're agreeing this is a final resolution and . . . your attitude is not that we should have tried [the case]. [¶] In other words, I want to be sure . . . all of us here[] are agreeing this has been submitted as though it were an opening statement," subject to counsel's submission of additional deposition excerpts, "and that is in effect . . . a summary judgment or as his Honor may want to call it, a ruling on my opening statement." Counsel "want[ed] it to be agreed" that the court would issue a final ruling on the issues. Husband's counsel opined the ruling would be "more analogous to [a] judgment on the pleadings."

On April 23, 2002, Wife submitted additional excerpts from the depositions of Husband and attorney Riede.

On May 31, 2002, the trial court issued an "Intended Decision," which begins with a recitation that on April 17 "the parties agreed that the court should interpret their premarital agreement and summarily decide whether the facts recited in [Wife's] []thirty-two page[] Trial Brief, as her offer of proof, would justify rescission of the agreement."

The court then stated that nothing in the additional deposition excerpts had changed its mind regarding the proper interpretation of Paragraph 7(b)—which the court continued to believe was Wife's interpretation, not Husband's. Specifically, the court found—applying established rules of contract construction—that the first sentence of Paragraph 7(b) imposed an obligation on the parties to make a reasonable effort to contribute a minimum annual amount of $20,000 into a community asset, if they could. The second sentence merely gave either party "[t]he 'discretion' . . . to determine for him or herself the total amount of his or her 'annual contribution.' In other words, the parties had to contribute $20,000 per year if they could, but were free to decide for themselves

whether to contribute more and, if so, how much more." The court concluded that Husband was able to contribute $20,000 under the provision, and would be held to his obligation to do so.

The court further stated that the parties' disagreement on the meaning of Paragraph 7(b) did not justify rescission of the Agreement, and did not amount to a failure of consideration, lack of mutuality, or mistake of law. The court stated that Wife had posited no facts showing fraud or promissory fraud, or any damage therefrom: "[Wife] will receive the consideration she reasonably could expect under the contract's terms—i.e., she'll get 'what she bargained for.'" The court also found Wife's fiduciary duty arguments "unavailing."[4]

On June 20, 2002, the court filed a formal "Order Fixing Procedure to Determine Bifurcated Issue." The court ruled that based on the stipulation of the parties, it treated the facts in Wife's trial briefs as the "equivalent of [her] opening statement at trial . . . ." Based on that "evidence" and oral argument, the court "holds that further trial is unnecessary and that the Premarital Agreement of the parties is valid and enforceable, and shall be construed and implemented as set forth in the Court's Intended Decision filed herein on May 31, 2002."

Also on June 20, 2002, the court filed a separate formal order, which essentially restated the rulings in the Intended Decision and their supporting reasoning.

Pursuant to former rule 1269.5 (now rule 5.180), Wife moved the trial court for certification for immediate appeal from the order determining the bifurcated issue. During the course of the hearing on that motion, Wife's counsel admitted that the issue of the validity of the Agreement had been submitted to the court on "comprehensive" facts. The trial court granted the motion for certification. Also pursuant to the rule, we granted Wife's motion for interlocutory appeal of the bifurcated issue.

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[4] During the April 17 hearing Wife conceded she was no longer proceeding on a theory of lack of voluntariness.

## II. DISCUSSION

We emphasize at the outset that Husband has not cross-appealed from that portion of the trial court's ruling which adopts Wife's interpretation of Paragraph 7(b). As such, the trial court's conclusion that Husband is liable to Wife under Paragraph 7(b) is not before us. Thus, generally speaking Husband is liable to Wife for one-half of six years' worth of annual $20,000 contributions (i.e., $120,000), or $60,000—subject to whatever adjustments, possible credits, or other fine-tuning the trial court may reasonably order, which again are not before us. The sole issue we determine is whether the trial court erred by ruling that Wife had made no showing of any valid ground to rescind the Agreement. We disagree with Wife's claims of error and affirm the trial court's decision.

We first discuss the appropriate standard of review. Wife argues the proceeding below, in which by stipulation the trial court considered Wife's trial brief as tantamount to an opening statement, was essentially a proceeding in nonsuit. She contends that we should employ the standard of review pertinent to a grant of a nonsuit to a defendant—i.e., that we must assume as true all facts asserted in a plaintiff's opening statement (or here, a trial brief) and indulge in all legitimate inferences those facts support. (See *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 663-664; *Aspen Enterprises, Inc. v. Bodge* (1995) 37 Cal.App.4th 1811, 1817.)

Husband, on the other hand, contends the proceedings below were analogous to a motion for judgment following the plaintiff's presentation of evidence (Code Civ. Proc., § 631.8), and we must employ the standard of review of substantial evidence. (See *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

We regard this bone of contention as a tempest in a procedural teapot. The procedure used below does not easily fall into any established pigeonhole of the judicial desk. In any event, whatever name one affixes to this unique proceeding does not matter for purposes of our review.

The trial court used an innovative, summary procedure to resolve what were essentially questions of contract interpretation and contract law. The procedure—*agreed*

*to by all*—was a creature of shifting nomenclature. It was referred to as "summary judgment," a "civil demurrer," a "preliminary hearing," and "judgment on the pleadings." As far as we can tell, the word "nonsuit" was mentioned only once in the record of the proceedings below, and that at the very end. During the hearing on the motion to certify the matter for appeal, the trial court noted the parties understood at the outset that "I would be, in effect, proceeding by way of summary judgment, if you will, or nonsuit or treating your brief as an opening statement and determining whether there were . . . triable issues of fact on certain legal issues."

We are not prepared to consider this a traditional nonsuit proceeding, and extend unquestioned veracity to Wife's factual assertions and every indulgence to concomitant inferences. Whatever one calls the procedure, the trial court simply tested Wife's factual allegations and evidence against applicable law. The court found them insufficient, essentially as a matter of law, to support Wife's claimed contract defenses and her claim of the right to rescission.

To the limited extent that the trial court made factual determinations as opposed to determining questions of law, we extend to those determinations the deferential appellate standard of review by substantial evidence. We feel this standard is appropriate, as both parties submitted the issues to the court for summary determination, offering deposition testimony as evidence, thereby submitting to the court the resolution of any fact in dispute.

We turn now to Wife's substantive contentions on appeal. Wife contends she is entitled to rescission on the grounds of failure of consideration, actual fraud, constructive fraud based on breach of fiduciary duty, and mistake. We disagree because Wife has not stated sufficient factual or legal grounds for any of these contract defenses. She has no right to rescission and is limited to money damages for Husband's breach of his obligation under Paragraph 7(b).

*Failure of Consideration*

The parties agree that a breach of a contract may amount to a failure of consideration and justify rescission—but only if the breach is material. (Civ. Code,

§ 1689, subd. (b)(4); see *In re Marriage of Garrity and Bishton* (1986) 181 Cal.App.3d 675, 684-685; *Pennel v. Pond Union School Dist.* (1973) 29 Cal.App.3d 832, 838.) "[A] person is not entitled to rescind or abandon a contract for an alleged breach of that contract when the breach does not go to the root of the consideration. [Citation.]" (*Karz v. Department of P. & V. Standards* (1936) 11 Cal.App.2d 554, 557.)

But whether a breach is sufficiently material to justify rescission is ordinarily a question of fact. (*Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 601; *Calabrese v. Rexall Drug & Chemical Co.* (1963) 218 Cal.App.2d 774, 782.) Here the trial court implicitly found Husband's breach of his obligation under Paragraph 7(b) not to be material. This finding is implicit not only in the court's denial of rescission for alleged failure of consideration, but also from the court's language in its dispositive formal order: "There is no 'failure of consideration.' The principal objects of the Premarital Agreement were to facilitate the parties' marriage and to define their financial rights during the marriage. The parties did marry and they each received that aspect of the 'bargained for' consideration."

This finding is supported by substantial evidence. The core of the Agreement was the preservation of each party's separate property during marriage, and the prevention of the creation of any community property except for the limited provision of Paragraph 7(b).[5] The precise provisions of Paragraph 7(b), particularly the requirement of an annual contribution of $20,000 as compared to Husband's vast income, is not sufficiently material to justify rescission. That is particularly true where, as here, rescission would award to Wife one half of *all* of Husband's earnings during marriage—a result clearly not contemplated by the parties when they executed the Agreement.

*Actual Fraud*

Wife contends she is entitled to rescission because Husband entered into the Agreement without any intention of performing under Paragraph 7(b). Wife's contention sounds primarily in promissory fraud, which is a promise made without any intention to

[5] And Paragraph 6, which is not before us.

perform. (See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973-974.)

However, Wife presented no evidence of any actual fraud, and the trial court so found. In the face of Wife's bald claim in her trial brief that Husband committed promissory fraud because he never intended to comply with Paragraph 7(b), the trial court simply noted that (a) the mere belief that the provision was purely discretionary does not legally show fraud and (b) Wife had not produced or posited any evidence, from the deposition excerpts or otherwise, of any fraud on the part of Husband.

As the trial court ruled: "[Wife] invites the court to infer that [Husband] 'made a promise he did not intend to perform' (because he testified at his deposition that he did not believe [P]aragraph[] 7(b) . . . created any obligations). However, counsel's unrelenting efforts to recast [Husband's] interpretation of the contested contract terms as an 'intent not to perform' were consistently rejected. Disbelief in the existence of an obligation [under Paragraph] 7(b) . . . does not equal intent not to perform or discharge it."

We agree. The mere fact that Husband believed that the provisions of Paragraph 7(b) did not impose on him any obligation to make an annual contribution to a community property asset, but left the contribution to his discretion, does not mean that he entered into the Agreement with any fraudulent intent.

*Constructive Fraud*

Wife briefly argues that she is entitled to rescission on a theory of constructive fraud, based on an alleged breach of Husband's fiduciary duty during the marriage. Wife argues, in essence, that Husband breached that duty by not making an annual contribution and not disclosing to Wife that he did not believe he was obligated to.

The trial court disposed of this contention in one sentence. The court appeared to reject the contention for the same reason it rejected the actual fraud claim, i.e., that Wife had not shown Husband's intent to defraud her. We realize Wife now claims constructive rather than actual fraud. But we see no breach of any fiduciary duty. Husband simply believed Paragraph 7(b) was discretionary and not mandatory.

*Mistake*

Finally, Wife claims she is entitled to rescission on the ground of mistake. She seems to claim that a mistake arose because she believed Paragraph 7(b) had one meaning and Husband believed it had another. Presumably Wife would call this a mistake of law. But as the trial court ruled, "There [is] no 'mistake of law' here—only conflicting interpretations of contract provisions." Wife was represented by her own attorney when she reviewed and executed the Agreement. In any case Wife's claim must fail, if only because rescission based on mistake of law requires materiality. (See *Harris v. Rudin, Richman & Appel* (2002) 95 Cal.App.4th 1332, 1339-1340; *Wood v. Kalbaugh* (1974) 39 Cal.App.3d 926, 932.) Paragraph 7(b) is not sufficiently material to the Agreement to justify rescission.

In summary, Wife has set forth no sufficient factual or legal ground for rescission of the Agreement.[6] Simply put, Wife interpreted Paragraph 7(b) as obligatory, while Husband interpreted it as discretionary. The court found against Husband and he now must compensate Wife under the provision. Wife has thus been made whole under the Agreement. Rescission is not justified and the trial court properly denied Wife that remedy.

## III. DISPOSITION

The order upholding the validity of the Agreement, and denying Wife the remedy of rescission, is affirmed.

[6] Wife has abandoned her argument that Paragraph 7(b) creates an illusory promise. This argument is premised on Husband's interpretation of that provision, which does not prevail.

Marchiano, P.J.

We concur:

Swager, J.

Margulies, J.